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IN THE

Supreme Court of the United States

October Term, 1944.

No. 581.

Commissioner of Internal Revenue, *Petitioner*,

v.

Court Holding Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

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Press of Byron S. Adams, Washington, D. C.

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CITATIONS.

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OPINIONS BELOW.

The opinion of the Tax Court (R. 86-102) is reported in 2 T. C. 531. The opinion of the Circuit Court of Appeals (R. 117-122) is reported in 143 F. 2d 823.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 11, 1944 (R. 123.) The petition for a writ of certiorari was filed on October 11, 1944, and was granted

on November 20, 1944 (R. 124). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether the Tax Court committed reversible error in holding that a sale made by the corporate taxpayer's two shareholders, of property received in the liquidation was, in substance, a sale by the taxpayer, the gain from which was attributable to it.

STATUTE AND REGULATIONS INVOLVED.

Internal Revenue Code:

Sec. 22. Gross Income.

(a) *General definition.* "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (26 U. S. C. 22).

Section 1141 (a) The Circuit Court of Appeals and the United States Court of Appeals for the the District of Columbia have exclusive jurisdiction to review the decisions of the Board, except as provided in Section 239 of the Judicial Code, as amended, 43 Stat. 938, (U. S. C. Title 28 § 346); and the judgment of any such court shall be final, except it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 240 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C. Title 28 § 347)

Sec. 1141 (c) "Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse

the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

Treasury Regulations 103, promulgated under the Internal Revenue Code:

Sec. 19.22 (a)-19. *Sale of capital assets by corporation.* If property is acquired and later sold for an amount in excess of the cost or other basis, the gain on the sale is income. If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale, computed as provided in sections 111 to 113, inclusive. If the purchaser takes over all the assets and assumes the liabilities, the amount so assumed is part of the selling price.

* * * * * * * * *

Sec. 19.22 (a)-21. *Gross income of corporation in liquidation.* When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. But see section 44 (d) and section 19.44-5. (See further section 19-52-2.)

STATEMENT.

The facts as found by the Tax Court (R. 87-83) may be summarized as follows:

Taxpayer, a Florida corporation, was organized in 1934 to acquire title, at a foreclosure sale, to an apartment building in Miami Beach. This was its only asset. Of its fifty shares outstanding, forty-eight were owned by Minnie Miller and the other two by her husband, Louis Miller. In 1938 taxpayer leased the building to Aaron

and Regina Feiwish for three years commencing October 1, 1938. Some time after October 1, 1939, the Feiwishes, together with a sister and brother-in-law of Mrs. Feiwish, the Fines, began negotiations with Minnie Miller for the purchase of taxpayer's property. In February, 1940, Louis Miller, acting as president of taxpayer, agreed to sell and the Fines agreed to purchase the property for $54,500. The terms of sale were agreed upon, and on February 22, 1940, the parties and their attorneys met for the purpose of having the oral agreement reduced to writing and executed. The attorney for the Fines prepared a contract embodying the terms of the oral agreement, but the writing was never executed by the corporation. At the meeting of February 22, taxpayer's attorney advised the purchased that taxpayer could not consummate the sale, for the reason that it would result in the imposition of a large income tax. (R. 87-88.)

On February 23, 1940, taxpayer's attorney and accountant met with Minnie and Louis Miller, and Harry Miller, their son (R. 84). The three Millers, constituting all of the taxpayer's directors, then held a special meeting at which it was resolved that "it would be in the best interest of the corporation to have it declare a dividend payable in the assets of the corporation, in complete liquidation and surrender of all the outstanding corporate stock." Immediately thereafter, Louis and Minnie Miller, as stockholders, held a special meeting and adopted a resolution ratifying the action of the directors. On the same afternoon, subsequent to adoption of these resolutions, a deed conveying taxpayer's property to Louis and Minnie Miller jointly was executed on taxpayer's behalf by Louis Miller as president, and attested by Harry Miller as secretary. Thereafter, the attorney for the purchaser was notified of the change in title and was requested to prepare a new contract naming the Millers individually as vendors. The contract was drawn, providing for the same purchase price and embodying the same terms and conditions as had been

previously agreed upon at the meeting of February 22, except for a correction in the amount stated to be the unpaid balance of an existing mortgage to which the sale was subject. It was executed by the Millers as vendors and by Margaret W. Fine as purchaser on February 26, 1940. The deed from taxpayer to the Millers was recorded the same day. (R. 89-90.)

The contract between the Millers and Mrs. Fine recited the receipt of a down payment of $1,000; this represented a credit against the purchase price of a rent payment in that amount made by the Feiwishes to taxpayer on January 5, 1940. The balance of the purchase price, amounting to $53,500, was payable in the amount of $12,500 in cash upon closing, by the assumption of an existing first and second mortgage, and the execution of a purchase money note and third mortgage. Two thousand dollars which had been deposited with taxpayer by the Feiwishes as security for performance of the lease was applied in reduction of the purchase money note and third mortgage. Taxpayer has transacted no business nor owned any property since the liquidation distribution, but has not been formally dissolved. (R. 90-91.)

In its 1940 return, taxpayer reported no gain as having been realized from the sale. In her individual return for 1940, Minnie Miller reported a long-term capital gain on the exchange of her stock for taxpayer's assets, of which fifty percent was taken into account. The Commissioner determined that taxpayer realized a taxable gain on the sale and computed a deficiency accordingly (R. 91-93). The Tax Court affirmed his determination (R. 93-101). The Circuit Court of Appeals reversed, one judge dissenting (R. 117-122).

While the foregoing statement of facts were the facts as found by the Tax Court, the following facts as found have no substantial basis in the record:

1. That the $1,000.00 recited as "down-payment" in the contract for the sale by the Miller's with Margaret W. Fine

dated February 26, 1940, "represented a credit against the purchase price of a rent payment in that amount made by the Feiwishes to taxpayer on January 5, 1940."

2. That sometime after October 1, 1939, the Feiwishes together with a sister and brother-in-law of Mrs. Feiwish, the Fines, began negotiations with Minnie Miller for the purchase of taxpayer's property. The record discloses that the negotiations began on February 20, 1940, (see Record 24). The only evidence to the contrary is the general statement prepared by the Revenue Agent for Minnie Miller's signature and signed by her. This statement is discussed below.

3. The Circuit Court of Appeals, having considered the entire record, reversed the Tax Court on the basis that its inferences and conclusions drawn from the facts found, were not supported by the evidence and were contrary to law.

TAXPAYER'S CONTENTION.

1. That under the statutes the Circuit Court of Appeals had the right and duty to hear the appeal.

2. That it had the right as well as the duty to reverse the decision of the Tax Court.

3. That the Findings of Fact made by the Tax Court do not warrant and are not a substantial basis for its inferences and conclusions drawn from them as properly decided by the Court below on appeal.

4. That certain findings of fact found by the Tax Court have no substantial basis in the evidence and are inconsistent with the evidence.

5. That certain findings of fact as set out by the Tax Court are based entirely on an ex parte statement of Minnie Miller when the Tax Court itself pointed out that the statement was not true.

6. Certain inferences drawn by the Tax Court are inconsistent with facts found by it.

7. There is no substantial basis in the record for the inferences drawn by the Tax Court.

8. The decision is contrary to the law as applicable to the facts found by the Tax Court and contrary to the law as applicable to the facts which do have substantial basis in the record.

SUMMARY OF ARGUMENT.

The so-called findings of the Tax Court on which its decision was based were in fact inferences or conclusions based on evidentiary facts which were not established by substantial evidence. Thus, they constitute errors of law and the Circuit Court of Appeals had the right and duty to reverse or modify the decision and to draw its own conclusions from established facts or the evidence. The Tax Court concluded that the taxpayer had entered into an oral contract to sell its property, received a part payment of the agreed price, and at the last moment in order to avoid taxes, distributed the property to its stockholders, who promptly thereupon bound themselves in writing to perform individually the act which they had heretofore agreed to perform as a corporation.

The conclusion that the taxpayer had entered into an oral agreement to sell its property is contrary to the facts. Under the law there can be no oral contract for the sale of real property in Florida. In the second place all the evidence indicates that it was the intention of the parties that they were to be bound only by a contract in writing and thus no contract was entered in. But conceding for the sake of argument that there was an oral agreement, it and all negotiations were definitely called and ended before the corporation was liquidated. There is no evidence to the contrary.

There is no controversy over the facts found by the Tax Court in its "Findings of Fact"—except the conclusion found as a fact that the $1,000.00 referred to as being paid on January 5 was applied as a part of the purchase price, and the failure to find that the negotiations for the sale began February 20, 1940, as shown by the evidence. As to that so-called fact that the $1,000.00 paid on January 5, 1940, was applied on the purchase price, there is no substantial evidence to support it—there is no evidence to substantiate the conclusion that the liquidation was a sham and there is no substantial evidence to establish the conclusion that the taxpayer made the sale here involved. In the absence of substantial evidence to support the inferences and conclusions from the evidence the Circuit Court of Appeals properly reversed the Tax Court and properly substituted its own findings based on the record.

ARGUMENT.

The regulations (see 19.22 (a)-21) promulgated by the Commissioner of Internal Revenue approved by the Secretary provide:

> "No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition."

This regulation has been in effect under all the Revenue Laws since the 1918 Revenue Act. It is therefore deemed to have received Congressional approval. This regulation has never been construed that it would not be effective if the Corporation had a purpose of tax saving by the liquidation and distribution of property to its stockholders,—that it would not be applicable if the Corporation or its stockholders received thereby any tax benefits.

In the case at bar there is no controversy over the fact that the Corporation was liquidated and the assets distributed to the stockholders. Admittedly the property was

legally distributed to the stockholders and admittedly the stockholders actually sold the property, made conveyance thereof in legal form and received the consideration therefor, except for the erroneous conclusion that $1,000 paid as rent to the corporation was applied on the purchase price.

But the Tax Court concluded and decided that notwithstanding the foregoing facts the sale was made by the Corporation—and not by the stockholders—this conclusion and decision was based on two evidentiary conclusions, namely that an oral agreement had been made by the Corporation to sell and that the corporation had received a part of the purchase price. It is submitted that neither of these conclusions or inferences is warranted by the evidence or has any substantial basis in the evidence.

These two conclusions or inferences will be discussed in their inverse order, and the question whether the Corporation received any part of the purchase price will be discussed first,—that involves the amount of $1,000 paid on January 5, 1940. The only evidence to support the conclusion or finding that this was applied on the purchase price is the affidavit of Minnie Miller. That statement was prepared by a revenue agent who refused to permit her to have counsel or any other person present. She made the general statement that all amounts paid as rent by the Fines or Feiwishes subsequent to October 1, 1939 were applied on the purchase price. There is no evidence, however, that said $1,000.00 paid to Louis Miller was paid as rent by the Fines or Feiwishes subsequent to October 1, 1939 were applied on the purchase price. The Tax Court in discussing this statement of Minnie Miller stated that it could not be correct and stated: (Rec. 95) "Thus payments made during 1939 could not have been on account of the purchase price," but stated if those amounts be eliminated from consideration it is apparent that the statement cannot be entirely correct. The Tax Court infers however that the $1,000 was paid on the purchase price at some time

prior to February 26, 1940 and that the only payment of that amount shown to have been made subsequent to January 1 was the $1,000 paid on January 5, The Tax Court relied only on the general statement of Minnie Miller from Exhibit E before the Tax Court that amount was paid to Louis Miller. There is not a word of evidence other than the statement of Minnie Miller, which the Tax Court stated was not correct, to the effect that it was applied on the purchase price. There is in fact no evidence that the Corporation received the amount.

The finding that it was so paid is contrary to all the direct and positive evidence in the case. The contract for deed Exhibit #5 recites a cash consideration of $1,000 received from Margaret W. Fine. (It is to be noted that the $1,000 disbursed on January 5, 1940 was disbursed by Aaron Feiwish) and was received by Louis Miller. See Exhibit E.

In the Petitioner's Exhibit 5, the memorandum agreement and deposit receipt it is further recited in paragraph 3 thereof that the deposit then acknowledged was to apply on the purchase price. The total consideration recited was $54,500 of which the said $1,000 was a part.

In the closing agreement dated April 1, 1940 reference is made to the $1,000 as cash "heretofore paid."

There can be no serious doubt that there is nothing in the record to show that there were any negotiations for the sale of the property prior to February 1940. The question then is how could a payment made on January 5, 1940 could then have been considered as being applied on the purchase price.

The recitation of consideration in the contract of sale which was carried into execution of the receipt of the $1,000 is presumed to be true unless substantial evidence is introduced to show the contrary. This is the contract between the Millers and the purchaser, after the liquidation.

The Contract of Sale by the Millers further recites that the $1,000 deposited as part of the purchase price, would be "returned" to the purchaser if the sale were not consumated on account of insufficiency of title.

This would mean that the Millers would "return" an amount never received by them, if it be held that the $1,000 paid January 5 were to be applied on the purchase price. This would mean that if the sale were not consumated, and even if it be construed that the taxpayer Corporation received the said $1,000 that it would forego rent to that extent. There is no evidence that it was intended to permit any free occupancy or forego collecting rent. Louis Miller testified that this $1,000 represented money borrowed on June 13, 1939 which was paid by crediting it against rent due in January. The Tax Court in its "Findings of Fact" (page 88 Record) states as follows: "The $500 note and the $1,000 were similarly applied in December 1939 and January 1940 respectively. The $350 cash bonus was subsequently entered upon petitioner's books as rent discount and deduction was claimed therefor on its 1939 return."

If the disbursement of $1,000 on January 5, 1940 from Aaron Feiwish to Louis Miller was another payment different and distinct from the $1,000 credited in January 1940 as found by the Tax Court, there is not a word of evidence in the record that it was received by or in behalf of the Corporation and no word of evidence of any character that it was applied on the purchase price, because the only evidence that such amount was received as part of the purchase price is the ex parte statement by Minnie Miller before the Revenue Agent, that all payments received by the Corporation "as rent" was applied on the purchase price. The Tax Court did not believe this statement, and pointed out why it could not be true, yet accepted the statement insofar as it related to the $1,000 represented by "disbursement" of Aaron Feiwish on January 5, 1940. If the $1,000 loan was paid in January 1940 as correctly

found by the Tax Court based on evidence is added to another $1,000 represented by a cash payment of that amount, it would make $2,000 paid in January 1940. Yet the record shows that only $1,000 was received in January 1940 by the Corporation. This was at a time when no negotiations had been entered into for the sale of the property by or in behalf of the Corporation. It would mean that the Corporation received $1,000 more than the regular rent as provided in the lease, and it would indicate the Tax Court did not base its finding even on the statement of Minnie Miller because she stated that "all amounts paid as rent" subsequent to October 1939 were applied on the purchase price. There is no evidence of any kind in the record to support the finding of the Tax Court that $1,000 was applied on purchase price paid to the Corporation. There was no reason disclosed by the record for the payment of excess rent and neither of the parties contemplated a sale or purchase at that time. From all that is disclosed by the record, if the January 5, 1940 payment is a separate and distinct matter not connected with the credit for that amount on rent on account of borrowed money, it was a personal matter between Louis Miller and Aaron Feiwish. There is nothing to show that the Corporation had anything to do with it.

In view of the foregoing the taxpayer respectfully submits that there is no substantial evidence in the record to support the finding by the Tax Court with respect to this $1,000 and the substantial and convincing evidence is to the contrary.

It is to be observed that the statements of disbursements of Aaron Feiwish so heavily relied on is all the disbursements of Feiwish and not merely those relating to rents or payments for the benefit of the taxpayer corporation. According to this statement Feiwish disbursed $10,225 in 1939 and $5,025 in 1940 It is not even contended that the Corporation received all these disbursements.

The next conclusion or inference on which the Tax Court based its decision is that there was an oral agreement made by Miller in behalf of the Corporation taxpayer to sell the property and that on account of the high tax which would result, the Corporation adopted and devised a plan to go through the form of liquidation and actually carry out that agreement, through the instrumentality of its stockholders.

This point was answered by the Circuit Court of Appeals in the opinion of the taxpayer correctly. This involves a question of law as well as a question of fact. In the first place under the law of the State where the contract was alleged to have been made there can be no contract to sell real property unless it is in writing. (Comp. Gen. Laws of Florida 1927 Vol. 3, Sec. 5779). The Supreme Court of Florida has held that even a part payment of the purchase based on an oral agreement to sell real property is not sufficient to give validity to the oral agreement. *Williams* v. *Bailey* (67 So. 887) and other cases. But the Tax Court holds that the above statements and decisions are not effective or applicable since the oral agreement was carried out and performed. It is respectfully submitted that there is not a word of testimony either substantial or unsubstantial in the record to show that the so-called oral agreement was carried out by the Corporation. The undisputed facts are that the so-called oral agreement was called off, the Corporation liquidated and the property actually sold by the stockholders. Certainly the Corporation did not execute the deed. In order that the rule of law applied by the Tax Court, that is that the oral contract was fully executed, there must be some evidence that the Corporation itself made the sale. Admittedly the stockholders made and executed the deed, and admittedly the title was in their name when they executed it and received the purchase price. The real question is whether the stockholders were acting as agents for the Corporation in making the sale. This depends upon the question whether the Corporation had con-

tracted to sell before the liquidation. Obviously the so-called oral agreement was not an effective agreement. Neither the purchaser nor the seller intended to be bound by an oral agreement. From the conduct of the parties it was obviously intended that their agreement was to be in writing. The Flordia law required such an agreement to be in writing and the conduct of all the parties clearly shows that they intended any agreement to be in writing to be effective. (See also Comp. Gen. Laws of Florida 1927 Sec. 5779) and *Tate* v. *Jones*, 16 Fla. 217; *William* v. *Bailey*, 69 Fla. 225 (67 So. 877) *Fireman's Fund Ins. Co.* v. *Craven*, 134 So. 232 (Fla.)

All the oral discussions were for the purpose of preparing a written instrument, which was intended to embody the contract. It is generally accepted law as laid down by this Court and other Courts that even a contract which would be effective by a parol agreement if so intended would not be effective as a contract if it was intended that the contract would be in writing, until the written agreement was executed. See *Ambler* v. *Whipple*, 20 Wall. 546, 22 Law Ed. 403; *Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Co.*, 20 F. (2d) 67; *Murrel* v. *American Railway Epxress Co.*, 269 S. W. 293 (Ky.) and *Roxton* v. *Armstrong*, 155 So. 755 (Florida).

Under this rule of law, under the facts in this case, there was no contract either oral or written, and the conclusion of the Tax Court that there was an oral contract made by or in behalf of the Corporation was an error of law.

In any event however it is undisputed that all negotiations and the pending deal for the sale by the Corporation were called off. The Corporation definitely decided not to sell. Whatever the reason for this action it is not disputed that this action was taken and the proposed purchaser was duly notified. This proposed contract was therefore not carried out by or in behalf of the Corporation.

When the Corporation was liquidated and its property distributed to the stockholders there was then no contract

for its sale of any kind either oral or written. It was not oral because the action of the parties was conclusive that they intended to be bound only by a written contract and in the second place, as properly decided by the Circuit Court of Appeals there could be no valid oral contract for the sale of realty in Florida.

It thus appears that the two fundamental conclusions or inference of the Tax Court on which it based its conclusion and decision that the liquidation of the Corporation and the sale of its property by the stockholders was a sham and did not represent what actually occurred, are not based on substantial evidence and are contrary to law and thus the decision is contrary to law.

There was no agreement binding the property subject to which the Millers took title. This was found by the Court below. This being true they were free to make any bargain they saw fit. They were free to accept the terms previously discussed with the prospective purchaser and any sale made by them would be their own sale. Either party was free to make any other terms if they had so desired. The Court below well said:

> "As we see it, the controlling fact is that there was no binding agreement to sell made by the Corporation and even the oral agreement was called off. The Millers wished to sell the property and realized their gain. It could lawfully be done in either of two ways: (1) The corporation could sell and distribute the gain; or (2) the corporation could liquidate, transfer the property to its stockholders, and they could sell."

II.

Established Principles Governing Scope of Appellate Review of Tax Court Decisions.

The Commissioner in his brief relies heavily on the decisions of this Court in the case of *Dobson* v. *Commissioner*, 320 U. S. 489 and *Commissioner* v. *Scottish American Investment Co.*, decided December 4, 1944. 65 S. Ct. 169.

Those cases are not authority for the finality of the decision of the Tax Court and do not under the facts of this case limit the judicial review of the decision of the Tax Court. In the *Dobson* case the Court said:

> "Its decision, of course, must have 'warrant in the record' and a reasonable basis in the law. But the 'judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' "

In the case of *Commissioner* v. *Scottish American Investment Co.*, the Court said:

> "And when the Tax Court's factual inferences and conclusions are determinative of compliance with statutory requirements, the appellate courts are limited to a determination of whether they have any substantial basis in the evidence. The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable. It must be cast directly and primarily upon the evidence in support of those made by the Tax Court.
>
> "If a substantial basis is lacking the appellate court may then indulge in making its own inferences and conclusions or it may remand the case to the Tax Court for further appropriate proceedings."

It is submitted that in the case at bar there was no warrant in the record and no reasonable basis in the law for the Tax Court decision and the Court below found that there was no rational basis for the conclusions of the Tax Court. It ably pointed out the fallacy of the conclusions and inferences drawn by that Court.

The heart of the Court's decision in the Scottish American Investment Co. above is that the Appellate Court review of a Tax Court decision is limited to a determination of whether there is substantial basis in the evidence for the decision of the Tax Court. It is respectfully submitted that this limitation was given full effect by the Circuit Court

of Appeals. There was no substantial basis for the decision of the Tax Court and it was contrary to law. The Circuit Court of Appeals has the right and duty to review the decision of the Tax Court and to correct the error of law and correct the factual inferences and conclusions of that Court which had no substantial basis in the evidence or in the law.

The attention of the Court is respectfully called to the fact that all the conclusions and inferences on which the Tax Court relied to find that this transaction whereby the Corporation was liquidated, its property conveyed to the stockholders and sold by them to the purchaser in this case was a mere sham and/or device to cover the real transaction; which it designated as a sale by the Corporation were outside of and not included in its "Findings of Fact". The Tax Court did not designate those inferences and conclusions as facts—and none of the facts found by the Tax Court as facts warrant any such inferences or conclusions.

Was the Liquidation by the Corporation and the Sale by the Stockholders a Mere Sham or Form Gone Through to Cover Up a Sale by the Corporation?

It was so held by the Tax Court but it is respectfully submitted that there is no substantial evidentiary basis for this holding. The Corporation had a right to liquidate and it did liquidate its assets and distributed them to its stockholders who made the sale. It had been in contemplation for more than a year but for the reason of contractual obligations of Louis Miller it was not practicable to liquidate until those obligations had been adjusted. When it was liquidated there was no outstanding contract or obligation entered into by or in behalf of the Corporation to sell the property as above stated. The discussions or plans to sell the property had been called off.

When the stockholders acquired the property they were free to do with it as they saw fit. In view of the facts the cases cited by the Commissioner in his brief holding

that tax consequences flow from the substances and not the form in which it is cast have no application. The cases of *Gregory* v. *Helvering* and *Minnesota Tea Co.* v. *Helvering* cited by the Commissioner have no bearing on this case. There is no substantial evidence for a finding that the transaction was other than what it purported to be, notwithstanding in a proper case such rule of law might be recognized and applied by this Court. There is nothing in this record to indicate that the transactions of liquidation and sale by stockholders was not bona fide.

Would it be reasonable on any substantial basis for the stockholders to act in behalf of the Corporation and make a sale of the property to which they had the legal title when the Corporation was clearly not bound to make such sale by a binding contract previously made? To state the question is to answer it.

It is argued that there was no business purpose in liquidating the Corporation that the property was not received by the stockholders to hold or use as their own, and from this argument the further argument is made that the stockholders were a mere conduit through which the Corporation passed title to the purchaser.

There is no substance to this argument and no substantial evidentiary facts on which it can be based. Obviously when stockholders receive property in liquidation of a Corporation, they have the free choice to sell, to hold or to use as they see fit, unless they are bound by a contract previously made. In this case there was no such contract and the stockholders as held by the Court below were free to sell.

The statement is made in the brief for the Commissioner that it has been uniformly held that where a Corporation in the course of liquidation transfers its property to a trustee or agent for its stockholders who thereafter sells the property, the sale is attributable to the corporation. Several cases are cited as authority. These cases do not support the proposition of law as stated in the brief. In

the case of *Hellenbush* v. *Commissioner*, 65 Fed. (2) 902 the Blackburn Varnish Co. through its officers had closed a deal whereby it would sell its assets to the Cook Co. To consummate the transaction the Corporation went through the form of dissolving the Corporation, appointing trustees for the stockholders, conveying the assets to the trustees and on the same day the sale was made in accordance with the agreement entered into by the Blackburn Co.

This case is obviously not authority to support the decision in the case at bar for here there was no such contract entered into, and none was in existence when the stockholders received the property.

In the other cases cited there was a binding agreement entered into which was carried out by stockholders. The only principle established by the cases cited by the Commissioner in his brief is that when there was a binding contract entered into by a Corporation and the corporation liquidates its property and conveys it to its stockholders who make the sale, that the sale will be considered as if made by the corporation. None of those cases go so far as to hold that there there was no binding contract when a corporation distributed its property to stockholders who sell, that the tax resulting will be imposed on the corporation.

The case of *Com.* v. *Falcon Co.*, 127, F. (2) 277 decided by the Court below is only the embodiment of the same principle as laid down by that Court in reversing the Tax Court in this case. The Court upheld and affirmed the Tax Court because it followed correct principles of law and there was substantial basis for the findings of the Tax Court and reversed the case at bar for the opposite reasons.

In the case of *Trippet* v. *Com.*, 118 Fed. (2) 764 the facts were that the corporation was not legally dissolved. The assets were turned over to two directors of the corporation, who had previously agreed on the terms of sale to an oil company. The Court held that those directors had no right to deal with the corporation property as their

own. The corporation had not been distributed in liquidation, but that they could legally act only as agents for the corporation.

The case of *Taylor Oil and Gas Co. v. Commissioner*, 47 Fed. (2) 108 is clearly not contrary to the view advocated by the taxpayer. That is another case relied on by the Commissioner to support his view.

In view of the evidence in this case and the lack of substantial evidence to support the Tax Court inferences, conclusions and decision on the facts and law the Court below properly reversed the decision of the Tax Court.

CONCLUSION.

The judgment of the Court below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 581.—October Term, 1944.

Commissioner of Internal Revenue, Petitioner, *vs.* Court Holding Company, a Florida Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[March 12, 1945.]

Mr. Justice Black delivered the opinion of the Court.

An apartment house, which was the sole asset of the respondent corporation, was transferred in the form of a liquidating dividend to the corporation's two shareholders. They in turn formally conveyed it to a purchaser who had originally negotiated for the purchase from the corporation. The question is whether the Circuit Court of Appeals properly reversed[1] the Tax Court's conclusion[2] that the corporation was taxable under Section 22 of the Internal Revenue Code[3] for the gain which accrued from the sale. The answer depends upon whether the findings of the Tax Court that the whole transaction showed a sale by the corporation rather than by the stockholders were final and binding upon the Circuit Court of Appeals.

It is unnecessary to set out in detail the evidence introduced before the Tax Court or its findings. Despite conflicting evidence, the following findings of the Tax Court are supported by the record:

The respondent corporation was organized in 1934 solely to buy and hold the apartment building which was the only property ever owned by it. All of its outstanding stock was owned by Minnie Miller and her husband. Between October 1, 1939 and

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[1] 143 F. 2d 823.

[2] 2 T. C. 531.

[3] Profits from the sale of property are taxable as income under Section 22(a) of the Internal Revenue Code, 26 U. S. C. 22. The Treasury Regulations have long provided that gains accruing from the sales of a corporation's assets, in whole or in part, constitute income to it, but that a corporation realizes no taxable gain by a mere distribution of its assets in kind, in partial or in complete liquidation, however much they may have appreciated in value since acquisition. Secs. 19.22(a)-19, 19.22(a)-21, Treasury Regulations 103.

February, 1940, while the corporation still had legal title to the property, negotiations for its sale took place. These negotiations were between the corporation and the lessees of the property, together with a sister and brother-in-law. An oral agreement was reached as to the terms and conditions of sale, and on February 22, 1940, the parties met to reduce the agreement to writing. The purchaser was then advised by the corporation's attorney that the sale could not be consummated because it would result in the imposition of a large income tax on the corporation. The next day, the corporation declared a "liquidating dividend", which involved complete liquidation of its assets, and surrender of all outstanding stock. Mrs. Miller and her husband surrendered their stock, and the building was deeded to them. A sale contract was then drawn, naming the Millers individually as vendors, and the lessees' sister as vendee, which embodied substantially the same terms and conditions previously agreed upon. One thousand dollars, which a month and a half earlier had been paid to the corporation by the lessees, was applied in part payment of the purchase price. Three days later, the property was conveyed to the lessees' sister.

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The Tax Court concluded from these facts that, despite the declaration of a "liquidating dividend" followed by the transfers of legal title, the corporation had not abandoned the sales negotiations; that these were mere formalities designed to make the transaction appear to be other than what it was" ~~and thus~~ avoid tax liability. The Circuit Court of Appeals drawing different inferences from the record, held that the corporation had "called off" the sale, and treated the stockholders' sale as unrelated to the prior negotiations.

There was evidence to support the findings of the Tax Court, and its findings must therefore be accepted by the courts. *Dobson* v. *Commissioner*, 320 U. S. 489; *Commissioner* v. *Heininger*, 320 U. S. 467; *Commissioner* v. *Scottish American Investment Co.*, 323 U. S. 119. On the basis of these findings, the Tax Court was justified in attributing the gain from the sale to respondent corporation. The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is

relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title.[4] To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

It is urged that respondent corporation never executed a written agreement, and that an oral agreement to sell land cannot be enforced in Florida because of the Statute of Frauds, Comp. Gen. Laws of Florida, 1927, vol. 3, Sec. 5779. But the fact that respondent corporation itself never executed a written contract is unimportant, since the Tax Court found from the facts of the entire transaction that the executed sale was in substance the sale of the corporation. The decision of the Circuit Court of Appeals is reversed, and that of the Tax Court affirmed.

It is so ordered.

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[4] Gregory *v.* Helvering, 293 U. S. 465; Minnesota Tea Co. *v.* Helvering, 302 U. S. 609; Griffiths *v.* Commissioner, 308 U. S. 355; Higgins *v.* Smith, 308 U. S. 473.